88-1348

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LEONA M. HELMSLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Is there a right to a pre-trial hearing under *Kastigar* v. *United States*, 406 U.S. 441 (1972) upon a claim, substantially supported by government concessions and undisputed facts, that a prosecution had its origin in immunized testimony and was developed by tainted personnel?

2. When such a pre-trial hearing is denied, is there interlocutory appellate jurisdiction because the underlying substantiated claim involves a right not to stand trial?

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Leona M. Helmsley petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit rendered in this case on December 29, 1988.

OPINIONS BELOW

The opinion of the court of appeals dismissing petitioner's appeal for lack of jurisdiction (App. 1a) is not yet reported. The order of the district court is unreported.

JURISDICTION

The opinion and order of the court of appeals dismissing petitioners' appeal was entered December 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself . . . .

Title 28, section 1291 of the United States Code, provides in relevant part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

Rule 12(e) of the Federal Rules of Criminal Procedure provides, in relevant part:

> A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected.

STATEMENT OF THE CASE

A. Introduction

This Petition seeks review of a decision of the United States Court of Appeals for the Second Circuit dismissing, for lack of jurisdiction, petitioner's appeal from the district court's denial of her motion to dismiss the indictment as tainted from its inception by immunized testimony, or for a pre-trial hearing under *Kastigar* v. *United States*, 406 U.S. 441 (1972). The remarkable feature of these refusals to hear a pre-trial *Kastigar* claim is that they stand against a record of undisputed evidence, including critical government concessions, that

the precipitating cause of the federal investigation was petitioner's immunized disclosures.

This petition contends that when a criminal defendant has made a showing that an indictment is tainted at its source she has a right not to stand trial at all unless the government overwhelms that proof in a pre-trial *Kastigar* hearing. And if, in such circumstances, the district court has denied a pre-trial *Kastigar* hearing, there is interlocutory appellate jurisdiction to reverse that decision.[1]

B. Statement of Facts

On April 14, 1988, a forty-seven count Indictment was filed in the United States District Court for the Southern District of New York against petitioner Leona M. Helmsley, her husband, and two other co-defendants.[2] The charges primarily concern allegations of tax evasion of approximately $1.2 million over a three-year period. The indictment was the product of an investigation con-

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[1] This is the second petition for writ of certiorari filed in this case. On November 1, 1988 a petition was also filed on behalf of Leona M. Helmsley, as well as her husband, Harry B. Helmsley, for consideration of whether an order denying a motion to dismiss an indictment for violations of Fed.R.Crim.P. 6(e) may be appealed prior to a final judgment of conviction. *See Helmsley* v. *United States*, Petition No. 88-732. The issue raised by that petition is already pending before this Court in *United States* v. *Midland Asphalt Corporation*, 840 F.2d 1040 (2d Cir.), *cert. granted*, 108 S.Ct. 2869 (1988), and the Helmsleys have sought consolidation of their petition with *Midland Asphalt*.

The present petition, concerning the protections of the Fifth Amendment against a prosecution emanating from sources tainted by immunized testimony, is wholly separate from the grand jury issues under Fed.R.Crim.P. 6(e) presented by *Midland Asphalt*. Therefore, notwithstanding that each case implicates issues of pre-trial appealability, certiorari should be granted here regardless of this Court's ruling in *Midland Asphalt*.

[2] The basis for federal district court jurisdiction in the first instance is 18 U.S.C. § 3231. The co-defendants are Harry B. Helmsley, Joseph V. Licari and Frank J. Turco.

ducted jointly by the offices of the New York State Attorney General and the United States Attorney for the Southern District of New York between December 1986 and April 1988.[3] A state indictment charging the defendants with 188 violations of state law, based on the same allegations, was unsealed on the same day as the federal indictment.

On June 17, 1988 petitioner Leona M. Helmsley moved for a hearing and dismissal of the federal indictment based upon violation of her Fifth Amendment rights arising from unconstitutional use of immunized state grand jury testimony she had given in June and November 1985. These state grand juries had been part of a broad-ranging investigation into sales tax fraud by New York jewelry vendors. In both state grand juries, Mrs. Helmsley's testimony was compelled under New York statutory immunity law and related to New York jewelry purchases that were purportedly shipped outside New York to, among other places, a home in Connecticut.

The constitutional defect in this prosecution is not just that some of Mrs. Helmsley's immunized state grand jury testimony, or evidence derived from it, may have been used by her federal grand jury, may have led to specific indictment allegations, or may be used at trial.[4] The Fifth Amendment fault in this prosecution runs much deeper for, on the existing unrebutted record, the impetus for the federal investigation itself is tainted by its origin in her immunized testimony. This all-pervasive constitutional defect arises from two chains of events that directly link petitioner's immunized state

[3] State attorneys handling the investigation were appointed as Special Assistant United States Attorneys; federal attorneys were appointed as Special Assistant Attorney Generals for the State of New York.

[4] The indictment does make allegations concerning gifts the Helmsleys had purchased, however, including at least one item purchased from a jeweler.

testimony with the commencement of the investigation that produced this indictment.

The government has *conceded* the first linkage—press reports of the immunized testimony that run directly back to the state grand jury room. Perhaps uniquely in this case, the principal Assistant United States Attorney has admitted under oath that an article in the *New York Post* "preceded and *precipitated*" the federal investigation of the "matters charged in this indictment." (Emphasis supplied.) Indeed, the government has conceded that a pending investigation turned to focus upon petitioner only after the *New York Post* article appeared.

That *New York Post* article, dated December 2, 1986, refers to earlier revelations by law enforcement officials of the sales tax allegations that were the subject of Mrs. Helmsley's immunized testimony. Those revelations took place only a month earlier when New York newspapers disclosed the immunized grand jury testimony Mrs. Helmsley had given on the sales tax matters. Ironically, the government itself has suggested at least one way in which the first articles reporting the immunized testimony led to the December article which, in turn, precipitated this investigation: Disgruntled employees, spurred by reports of her [immunized] sales tax testimony, may well have been "the source of the information which led to the publication of the December 2, 1986 article in the *New York Post* . . . ." [5].

The second chain linking the federal investigation to the state grand jury room is also undisputed. The New York Assistant Attorney General who conducted the ex-

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[5] Such a link offends the Fifth Amendment. "The prosecutor may never have seen the witness's testimony and may believe in good faith that no one associated with the federal prosecution has seen it, but such a disclaimer does not preclude the possibility that someone who has seen the compelled testimony was thereby led to evidence that was furnished to federal investigators." *United States* v. *Nemes*, 555 F.2d 51, 55 (2d Cir. 1977).

amination of Mrs. Helmsley during her first immunized grand jury appearance (June 1985) also initiated the investigation of Mrs. Helmsley by the State of New York which ultimately, after joining forces with the federal government, led to this indictment. A second state prosecutor who was present during Mrs. Helmsley's first immunized testimony later conducted the examination of Mrs. Helmsley in the other sales tax investigation (November 1985) in which she gave immunized testimony, indicating a cooperative effort, and sharing of information, between those two investigations. Finally, and most importantly, a third state prosecutor present during Mrs. Helmsley's first immunized grand jury testimony assumed responsibility for heading the participation of the New York Attorney General's Office in the joint federal/state investigation which led to this indictment. She has been appointed as a Special Assistant United States Attorney, and remains a member of the federal prosecution team.

In short, even on the existing record, without a *Kastigar* hearing, there is *prima facie* proof of an evil *Kastigar* explicitly condemned—"focusing investigation on a witness as a result of [her] compelled disclosures." 406 U.S. at 460. Put otherwise, if Mrs. Helmsley had not been compelled to testify, the articles that ultimately caused federal prosecutors to focus upon her might not have appeared; certainly they would not have had her testimony to report. Moreover, state personnel present at her grand jury testimony would not have had their information to share and this investigation would not have expanded after the *New York Post* article, as the government concedes it did, to encompass petitioner.

If these facts remain unrebutted, then there is no basis upon which a trial could proceed because the investigation that produced this indictment is tainted at its source. Nonetheless, the government urged the district court to wait for a rebuttal until after trial. The district court agreed, denying both petitioner's motion to dismiss and her alternative request for a hearing under *Kastigar*.

Petitioner filed a timely Notice of Appeal to the United States Court of Appeals for the Second Circuit and, after oral argument, that court rejected the contention that it had jurisdiction to hear an interlocutory appeal. The core of the court's reasoning was that, under the collateral order exception to the finality rule, "prior to final judgment [appeals] are . . . limited to three kinds of cases. *See Abney* v. *United States*, 431 U.S. 651, 656-62 (1977) (Double Jeopardy); *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979) (Speech and Debate Clause); *Stack* v. *Boyle*, 342 U.S. 1, 6 (1951) (motion to reduce bail)." (App. 5a-6a) Insofar as relevant here, the principle justifying these exceptions is that these cases "protect more than a right not to be convicted. In each case, the right involved is a right not to stand trial at all for the charged offense." (App. 7a)

REASONS FOR GRANTING THE WRIT

This case enables the Court to address an important and recurring problem in the administration of federal criminal justice: when, if ever, must a district court hold a *Kastigar* hearing prior to trial and when, if ever, is there interlocutory appellate jurisdiction to rectify a failure to do so. Petitioner respectfully submits that these questions are intertwined and that the answer to both can be derived from strict attention to principles of federal criminal procedure, the Fifth Amendment, and the law of interlocutory review.

A. Under Federal Criminal Procedure

A *Kastigar* motion, like all motions filed prior to trial, is subject to the Federal Rules of Criminal Procedure which declare that ordinarily a pre-trial motion "shall be determined before trial," Fed. R. Crim. P. 12(e). Rule 12(e) does provide for deferral of a motion, but only upon a showing of "good cause." Consistent with this exception, federal case law has honored discretion in the district courts to determine when to hold a *Kastigar*

hearing. See, *e.g.*, *United States* v. *Tantalo*, 680 F.2d 903 (2d Cir. 1982); *United States* v. *Frumento*, 552 F.2d 534 (3d Cir. 1977) (*en banc*); *United States* v. *De Diego*, 511 F.2d 818, 824 (D.C. Cir. 1975).

The existence of discretion over *Kastigar* timing, however, does not eliminate the need for the showing of "good cause" required by the Rule. And, petitioner submits, there is at least one circumstance, presented here, in which no such showing can be made. That circumstance is present when an immunized defendant brings forth *prima facie* proof that a prosecution, in its very inception, is tainted by immunized testimony. In that circumstance, a *Kastigar* claimant can assert, with record support, that he or she is entitled, not merely to a trial free of evidence derived from immunized testimony, but to freedom from trial itself.[6] Lest that entitlement be meaningless, such a claimant must be afforded a hearing before any trial is held.

B. Under Fifth Amendment Law

This conclusion follows, too, from Fifth Amendment principles.

In the circumstances of this case, only a hearing held prior to trial can fulfill the promise made by this Court when it sustained the concept of immunity as against the challenge that it did not provide protection equivalent to that afforded by the Fifth Amendment. The promise made in those cases guaranteed that a witness who is compelled to testify has a right to be left "in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Kastigar*, *supra*, at 462; *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 79 (1964). A witness who can make a strong *prima facie* showing, as petitioner can, that she became the focus of an investigation as a direct result of her immunized tes-

[6] This is not the equivalent of transactional immunity because the transactions can be prosecuted if there is an untainted source for the prosecution.

timony and that government participants in her immunized appearance later built the case against her, surely has a substantial claim that if she had been permitted to invoke the privilege no prosecution would ever have ensued. To put such a witness "in substantially the same position" as if she had claimed the privilege requires acknowledging a right not to be tried on such an indictment if the claim survives government rebuttal. And to make that right meaningful, a test of the claim must obviously come before the trial.

Anything less simply breaks *Kastigar's* promise.

C. Interlocutory Review

Moreover, if the district court refuses a hearing to test such a claim, there must be interlocutory appellate jurisdiction to rectify that error. The court of appeals here denied such jurisdiction because it failed to see that, at the heart of a *Kastigar* case such as this, there is the same kind of claim that has traditionally justified interlocutory review in those categories of criminal cases in which it has been allowed. The traditional cases, like this one, involve a claim of right not to stand trial. The court of appeals correctly observed that such a right not to stand trial is what has justified interlocutory review of claims of Double Jeopardy, *Abney* v. *United States*, 431 U.S. 651, 656-62 (1977) and Speech and Debate Clause immunity, *Helstoski* v. *Meanor*, 442 U.S. 500, 508 1979). (App. 7a) But it failed to acknowledge that the same claim of right is justifiably invoked by this petitioner.[7] The court of appeals fell into error because it mischaracterized petitioner's contention as follows:

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[7] The protections against Double Jeopardy and Speech and Debate prosecution *could* both be vindicated by reversing convictions rather than by aborting trials through interlocutory review. Likewise, a claim that an entire prosecution violates the Fifth Amendment *could* be so vindicated. There is no theoretical difference as among these three categories. In each, courts permit interlocutory review, because it would trivialize the protection afforded by each constitu-

> . . . according to appellant, the Fifth Amendment guarantees her a right not to be tried when the government has used *in any way* her immunized state grand jury testimony. (App. 6a-7a) (emphasis supplied)

Petitioner contends no such thing. For example, a right not to be tried is not entailed by a claim that a single item of evidence with tainted origins may be offered at trial. In such a case, a district court might well properly exercise discretion to defer a *Kastigar* hearing because that item might never actually be offered. Likewise, there would be no need for interlocutory review because post-conviction appellate review can fully vindicate the Fifth Amendment right to be free of the use of immunized testimony.

But this is not a case in which petitioner challenges simply a particular item or items of evidence as tainted. Instead, petitioner has established a solid record in support of her contention that the *entire prosecution* commenced as a result of public disclosure of immunized grand jury testimony. Most importantly, critical elements of her proof are *conceded* by the government. The government has *admitted* that the federal investigation was "precipitated" by, and began to focus upon petitioner because of, a newspaper article which referred to the substance of her immunized testimony and was part of a chain of newspaper reports linking directly back to the immunized testimony. Moreover, the government has also conceded that federal prosecutors have been "sharing information fully" with state prosecutors, at least one of whom was present during petitioner's immunized testimony and later became a member of the federal prosecutorial team.

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tional claim to regard it as entailing anything other than a right not to stand trial.

Only the bail right case, *Stack* v. *Boyle*, *supra*, truly requires interlocutory review as a matter of logic.

Indeed, it would be difficult to imagine a stronger *prima facie* case of total prosecutorial taint than the one presented here. Absent *Kastigar* proof to the contrary, petitioner has established her claim to be free of any trial stemming from this investigation because it is tainted at its source.

Because only a pre-trial hearing can vindicate a right not to be tried at all, the district court was required to hold one. And the court of appeals likewise had interlocutory jurisdiction to vindicate that right just as it has such jurisdiction when the right not to be tried is at stake in other contexts.

CONCLUSION

Courts are justifiably concerned about the delay inherent in the multiplication of pretrial hearings. *Kastigar* hearings, like others, can properly be delayed when there is "good cause" to do so within the meaning of Rule 12, Fed. R. Crim. P. Routine deferral of these hearings, however, is neither consistent with the federal rule nor loyal to the Court's commitment in *Kastigar* to police immunity abuses and ensure that an immunized witness finds herself in substantially the same position he would have occupied if he had claimed the privilege.

There are surely some cases in which a pre-trial hearing is mandatory because the immunity abuse claimed, *and supported with prima facie evidence*, condemns the entire prosecution. This case provides a vehicle for the Court to say so, to provide much needed guidelines for *Kastigar* timing issues, and to ensure that the commitment to the Constitution made when immunity was sanctified is not subtly eroded by *Kastigar* hearings that either never take place or, as threatened here, take place too late to fully restore to an immunized witness the benefit conferred by the privilege.

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 482—August Term 1988

(Argued October 18, 1988 Decided December 29, 1988)

Docket No. 88-1391

UNITED STATES OF AMERICA,
Appellee,

v.

HARRY B. HELMSLEY, LEONA M. HELMSLEY,
JOSEPH V. LICARI, and FRANK J. TURCO,
Defendants,

LEONA M. HELMSLEY,
Defendant-Appellant.

Before:

VAN GRAAFEILAND, CARDAMONE and PIERCE
Circuit Judges

Leona M. Helmsley takes this expedited appeal from the August 30, 1988 order of the United States District Court for the Southern District of New York (Walker, J.) denying appellant's motion to dismiss the indictment or for a pretrial hearing.

Dismissed.

Judge Van Graafeiland concurs in a separate opinion.

JAMES A. BRUTON, Washington, D.C. (Williams & Connolly, Gerald A. Feffer, Washington, D.C., of counsel; Gallop, Dawson & Clayman, Charles E. Clayman, New York, New York, of counsel on the brief), *for Defendant-Appellant.*

ROBERT HAMMEL, Assistant United States Attorney, Southern District of New York, (Rudolph W. Giuliani, United States Attorney, Linda Imes, Assistant United States Attorney, Southern District of New York, New York, New York, of counsel), *for Appellee.*

CARDAMONE, *Circuit Judge*:

This is an appeal from an order denying a motion to dismiss an indictment that charges Leona M. Helmsley with a long litany of activities in which she allegedly promoted her own financial self-interest in violation of the law. The legal hurdle appellant faces is the finality rule, which she tried without success to surmount once before. Her present appeal is nothing more than a repackaged version of the first attempt, with the added request that—if this edition meets the same fate as the former one—we lower the legal hurdle. The finality rule limits appeals so that only those taken from a final judgment may be heard. It has been the notion of our law since its earliest days to avoid piece-meal interlocutory appeals because of the consequent delays they create. That rule has served long and well and this interlocutory appeal presents no reason for altering it. Hence, appellant's claim must await final judgment after trial on the charges.

Appellant Helmsley appeals from an August 30, 1988 order of the United States District Court for the Southern District of New York (Walker, J.) denying her motion to dismiss an indictment filed against her, and also denying her motion for a pre-trial *Kastigar* hearing on

her allegation that the government has abridged her Fifth Amendment rights. *See Kastigar v. United States*, 406 U.S. 441 (1972). Appellant moved for an expedited appeal from the above order, to which the government consented, and the district court rescheduled her trial for January 23, 1989. This appeal was heard on October 18, 1988. We now dismiss it.

I FACTS AND PROCEDURAL HISTORY

The 47-count indictment charges Leona M. Helmsley and her husband, Harry B. Helmsley, and two other officers of the Helmsley Corporations with using their control of a large group of real estate, hotels, insurance and related business over the period from June 1983 to October 1986, with conspiracy to defraud the United States and the Internal Revenue Service. In addition to conspiracy, the defendants are charged with tax evasion of approximately $1.2 million, filing false tax returns, mail fraud—involving an allegedly fraudulent use of corporate funds to pay for the renovation of "Dunnellen Hall" in Greenwich, Connecticut—and extortion. The last charge alleges that defendant Helmsley demanded kickbacks of goods and services for Dunnellen Hall from certain contractors and vendors doing business with the Helmsley organization, threatening them that Helmsley business would be withheld unless the kickbacks were paid.

The indictment was filed on April 14, 1988. In her first challenge appellant moved on June 17 to dismiss it on the grounds of a prejudicial leak of pre-trial publicity, which defendant claimed constituted violations of grand jury secrecy in contravention of Fed. R. Crim P. 6(e). The district court denied defendant's Rule 6(e) motion on July 29, 1988. A panel of this Court issued a summary order on September 14, 1988 dismissing for lack of jurisdiction defendant's appeal from that denial.

The instant appeal is defendant's second challenge to the indictment. It concerns Leona Helmsley's June 11 and November 7, 1985 appearances before a New York County grand jury investigating allegations of New York State sales tax fraud. On June 17, 1988 defendant—who had previously entered a not guilty plea—moved for a hearing and dismissal of her federal indictment. Defendant claims her Fifth Amendment rights were violated; she alleges that the federal grand jury made use of her June and November, 1985 immunized state grand jury testimony. Appellant complains of "taint" of the federal grand jury process because of press reports of her testimony before the state grand jury, from an overlap in state and federal prosecutorial personnel, and from the prosecutors' alleged sharing of evidence. In sum, Helmsley contends that she was targeted for the federal prosecution by virtue of her state grand jury testimony. On August 30, 1988 Judge Walker denied this motion to dismiss the indictment, and ruled that the *Kastigar* hearing could be held after the trial in the event of a conviction. This expedited appeal followed.

II DISCUSSION

This second motion to dismiss the indictment is cast in somewhat obscure terms, perhaps to avoid appearing to challenge the same indictment before the same district court judge on essentially the same grounds. It appears to allege general unfairness of the grand jury process rather than the earlier more specific attack she made under Rule 6(e). Stripped of its subtleties, defendant Helmsley's argument, in essence, asks that the collateral order exception to the finality rule be expanded. This request is based on defendant's contention that if review is not granted now, protection of her Fifth Amendment rights will be forever lost. To put her arguments for an expansion of the collateral order exception in proper perspective, we discuss first the finality rule, and then the collateral order doctrine exception to it.

A. *The Finality Rule and the Collateral Order Exception*

In creating those courts inferior to the Supreme Court, Congress since the Judiciary Act of 1789 has carefully limited their appellate jurisdiction. Under 28 U.S.C. § 1291 appeal is allowed only "from all final decisions of the district courts." In a criminal case, as here, an appeal usually may be taken only after sentence has been imposed because that is the final judgment in such a case. *Flanagan v. United States*, 465 U.S. 259, 263 (1984); *Berman v. United States*, 302 U.S. 211, 212 (1937); "Project: Seventeenth Annual Review of Criminal Procedure" 76 Geo. L. J. 1199, 1206 n.3330 (1988) (collecting cases). The "finality" rule has been the cornerstone of appellate jurisdiction from the earliest days of the Republic. *See DiBella v. United States*, 369 U.S. 121, 124 (1962). The rule promotes appellate deference to trial judges, reduces the ability of litigants to engage in delaying tactics, avoids piecemeal appeals, and is recognized as an essential tool in the efficient administration of justice. *See Flanagan*, 465 U.S. at 263-64 (1984); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

The recited policy considerations of prompt adjudication underlying the finality rule are of even greater moment in the field of criminal law. *See Flanagan*, 465 U.S. at 264. These policies are undermined when the conclusion of the criminal proceedings are fragmented and delayed. Thus, not only the accused but also society have a strong interest in avoiding delay. *See id.* 465 U.S. at 264-65; *United States v. Hollywood Motor Car*, 458 U.S. 263, 265 (1982); *Cobbledick v. United States*, 309 U.S. 323, 325-26 (1940). In light of these considerations, the collateral order exception is more narrowly circumscribed in criminal cases. Appeals prior to final judgment are therefore limited to three kinds of cases. *See Abney v. United States*, 431 U.S. 651, 656-62 (1977)

(Double Jeopardy); *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (Speech and Debate Clause); *Stack v. Boyle*, 342 U.S. 1, 6 (1951) (motion to reduce bail).

Congress recognized that rigid enforcement of the finality rule may in some cases cause grave injustice. It therefore created certain exceptions by statute. *See, e.g.*, 28 U.S.C. § 1292(a) (injunctions, receivership, admiralty). Moreover, the Supreme Court has traditionally given the finality rule a "practical rather than a technical construction." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

Cohen articulated what has become known as the collateral order exception to the finality rule. The Court stated that in a small class of cases there are claims of right "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. The doctrine today permits immediate appeal of an order that conclusively determines the disputed question, which issue is completely separate from the merits of the action, and which is effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978); *Abney v. United States*, 431 U.S. 651, 658 (1977).

B. *Appellant's Fifth Amendment Claim*

None of the limited claims in criminal cases of Double Jeopardy, Speech and Debate Clause, or reduction of bail are raised on this appeal. Instead, appellant principally argues that we should create a new exception to the finality rule in cases involving an alleged Fifth Amendment violation. Appellant asserts that she should be entitled to bring an appeal from a non-final order denying her motion to dismiss the indictment because, according to appellant, the Fifth Amendment guarantees her a right not to be tried when the government has

used in any way her immunized state grand jury testimony. As a corollary to this contention, defendant also asserts that her right not to be tried may only be established by granting her a pretrial *Kastigar* hearing on the issue of possible taint.

The taint arises, Helmsley claims, because Assistant New York State Attorney General Diane Peress was present on June 11, 1985 when Helmsley gave immunized testimony before the New York County Grand Jury. Although there is some dispute about whether anyone connected with the current federal case was present on November 7, 1985, the occasion of Helmsley's second New York State Grand Jury appearance, it is conceded by the government that Ms. Peress has now been designated as a Special United States Attorney, has actively participated in this federal prosecution and is one of the prosecutors responsible for the trial of defendant Helmsley and her co-defendants. Under *Kastigar*, a witness compelled to testify under a grant of immunity must be left in substantially the same position as if the witness had claimed the Fifth Amendment privilege. *See Kastigar*, 406 U.S. at 457. Defendant now claims that if the federal investigation was initiated as a result of information gleaned from her state immunized testimony, she will not be in the same position—if she is forced to stand trial—as if she had claimed her Fifth Amendment rights.

Defendant's argument is fundamentally flawed. As the Supreme Court observed in the three limited criminal case exceptions to the finality rule, an order refusing to reduce bail becomes moot if review must await conviction and sentence. *See, e.g., Flanagan*, 465 U.S. at 266; *Stack v. Boyle*, 342 U.S. 1, 6 (1951). Similarly, the Double Jeopardy and the Speech and Debate Clause exception protect more than a right not to be convicted. In each case, the right involved is a right not to stand trial at all for the charged offense. *See Flanagan*, 465 U.S. at 266. Even assuming the truth of defendant's

taint allegations, a viable Fifth Amendment claim simply does not confer upon the accused a right not to stand trial at all. The denial at the trial level of a Fifth Amendment right—like prosecutorial vindictiveness and the claimed denial of a speedy trial—does not outweigh the strong policy considerations underlying the finality rule so as to make such denial the subject of an interlocutory appeal. *See Hollywood Motor Car Co.*, 458 U.S. at 267 (prosecutorial vindictiveness "fails the third part of the test for *Cohen* . . . that the claim 'be effectively unreviewable on appeal from a final judgment.' ") (quoting *Coopers & Lybrand*, 437 U.S. at 468); *United States v. MacDonald*, 435 U.S. 850, 860 (1978) (Right to speedy trial does not encompass "right not to be tried" that must be vindicated before trial.). Thus, we decline to expand the collateral order exception in this case.

C. *Appellant's Claim Does Not Satisfy the Collateral Order Exception*

Appellant also argues that the district court's order is appealable because it falls within the collateral order doctrine. Judge Walker dismissed Helmsley's motion without prejudice and emphasized that defendant could renew the motion if and when she is convicted. The motion, of course, becomes moot if she is acquitted. Hence, the trial court's order did not "conclusively determine the disputed question" because that court has not held a hearing to address the merits of defendant's allegations, and could rule in her favor after a trial. *See Coopers & Lybrand*, 437 U.S. at 468; *Cohen*, 337 U.S. at 547.

Nor does the order meet the third collateral exception requirement that it "be effectively unreviewable on appeal from a final judgment," as Helmsley contends. In support of this argument, defendant points out that the Supreme Court has granted *certiorari* in *United States v. Midland Asphalt*, 840 F.2d 1040 (2d Cir.), *cert.*

granted, Midland Asphalt Corp. v. United States, 108 S. Ct. 2869 (1988). In *Midland Asphalt*, we held that the Supreme Court's decision in *United States v. Mechanik* did not preclude "a federal court of appeals from exercising post-trial review" of alleged violations of Fed. R. Crim. P. 6(e). 840 F.2d at 1046. Helmsley posits that if *Midland Asphalt* is reversed—and if the Supreme Court extends *United States v. Mechanik*, 475 U.S. 66 (1986) (denying post-conviction review of alleged 6(d) violation because violation, if any, was found to be harmless because of a "supervening jury verdict")—she would then be unable to obtain *any* post-conviction review of the alleged grand jury-related improprieties.

As a reason for fitting the instant order within the collateral order exception, this parade of horribles is too remote and speculative to be persuasive. Defendant has cited no authority for the proposition that the third prong of the *Cohen* exception is satisfied by *potential* unreviewability. And, such a proposition is plainly untenable because it has no limiting principle. Further, because there is no way to know how the Supreme Court will rule in *Midland Asphalt*, we must apply the law as it exists at the time of this writing. Examining that law satisfies us that defendant may raise her allegations of grand jury abues of process after trial. *See United States v. Larouche Campaign*, 829 F.2d 250, 253 (1st Cir. 1987) (per curiam); *United States v. Taylor*, 798 F.2d 1337, 1340 (10th Cir. 1986); *cf. Midland Asphalt*, 840 F.2d at 1046.

Moreover, even if appellant's predictions on *Midland Asphalt* prove accurate, it does not follow that she would be automatically denied post-conviction review. Concededly, a reversal of *Midland Asphalt* might decrease access to post-conviction review, but the door could remain slightly ajar. As Justice Marshall has observed interlocutory review might be appropriate if post-conviction review was wholly unavailable. *Mechanik*, 475 U.S. at

81 n.1 (Marshall, J., dissenting); *Midland Asphalt*, 840 F.2d at 1046; *cf. United States v. Benjamin*, 812 F.2d 548, 550 (9th Cir. 1987) (interpreting *Mechanik* to bar post-conviction review of 6(e) violation and therefore requiring interlocutory review). As appellant is entitled to post-conviction review as the law now stands, and still may have access to such review regardless of *Midland Asphalt*'s disposition, interlocutory review is unnecessary and hence premature.

III CONCLUSION

In sum, the instant order is not final. Because appellant has failed to meet two of the three requirements under *Cohen*, it is not appealable under the collateral order exception for the finality rule. Nor do we see any reason to lower the legal bar of the finality rule by creating an additional exception to the collateral order doctrine in this case. Were appellant's proposed exception adopted, it would swallow the rule. We are therefore without jurisdiction to rule presently on the merits of the appeal. It is accordingly dismissed.

Appeal dismissed.

VAN GRAAFEILAND, *Circuit Judge*, concurring:

I am satisfied that Judge Pierce's persuasive reasoning in *United States v. Midland Asphalt Corp.*, 840 F.2d 1040, 1045-46 (2d Cir. 1988), will not be rejected by the Supreme Court. In any event, unless and until it is, the *Midland* decision is binding on this Court. Moreover, even if Judge Walker's decision to defer in the instant case were appealable, I would hold on the merits that the decision was made for good cause, since the district court felt that "the trial record would enable the Court to better determine whether the appellant's Fifth Amendment rights were infringed." *See United States v. Williams*, 644 F.2d 950, 952-53 (2d Cir. 1981); *United States v. Nemes*, 555 F.2d 51 (2d Cir. 1977); 3A Wright, *Federal Practice and Procedure: Criminal* § 194 (1982); Fed. R. Crim. P. 12(e).